the writ was issued without authority. Croom *v.* Morrisey, 63 N. C. 591.

The clerk of a superior court acts ministerially, and not judicially, in issuing a summons; and, in an action in his own behalf, he may himself issue the summons and other process. Evans *v.* Etheridge, 96 N. C. 42, 1 S. E. 633.

As to the meaning of this phrase "process awarded in court," the court in Hastings *v.* Columbus, 42 O. St. 588, uses the following language: "By force of the adoption by several Saxon kings, and general acquiescence for centuries in such adoption, the canon promulgated A. D. 517 acquired the force of, and became in truth common law, in a single particular, namely, that process awarded, or a judgment rendered, by a court on Sunday, was void, and that is the law wherever the common law prevails, except as modified by statute. Swann *v.* Broome, Hiller *v.* English. Whether this prohibits the receipt of a verdict on Sunday, is a matter about which there is some conflict, with the weight of authority in favor of the power to receive the verdict on that day. In Morehead *v.* State (reported on other points in 34 Ohio St. 212), the verdict was received on Sunday, and this court unanimously held that there was no error in so receiving it. That process issued by a ministerial officer, in the ordinary course of official duty, is not process awarded by a court, within the meaning of the above phrase, was shown in Clough *v.* Shepherd, 31 N. H. 490."

FAYETTE NAT. BANK *v.* SUMMERS.

Sept. 13, 1906.

[54 S. E. 862.]

1. Bills and Notes—Bona Fide Purchasers—Checks—Deposit in Bank—Title of Bank.—Where a check is passed by a bank to the credit of the depositor and mingled with its general funds, the bank may permit the depositor, as a matter of favor, to check against the deposit before the collection of the check; the depositor in the event of nonpayment being responsible for the sums drawn, so that such deposit does not necessarily make the bank a bona fide indorsee of the check for value.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, § 908.]

2. Sales—False Representations—Failure of Consideration—Damages—Set-Off.—In an action on a check given for the price of a horse sold to plaintiff on certain representations, one of which proved false, where it appeared that the horse in spite of the defect was of considerable value and that the damages sustained by the false representation did not go to the full amount of the check which represented the full value of the horse as represented, plaintiff was entitled to recover such value of the horse less the damage caused by the defect.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 966, 1061.]

Error to Circuit Court, Pulaski County.

Action by the Fayette National Bank against C. G. Summers. A judgment was rendered in favor of defendant, and plaintiff brings error. Reversed.

T. L. Massee, for plaintiff in error.
J. C. Wysor, for defendant in error.

KEITH, P. Upon the trial of an action of assumpsit brought by the Fayette National Bank against C. G. Summers, there was a verdict and judgment for the defendant, and the case is before us upon a writ of error allowed by one of the judges of this court.

The plaintiff, to maintain the issues at the trial, introduced a check drawn on the Pulaski National Bank by C. G. Summers to the order of John T. Hughes for $500 dated October 26, 1903. This check was indorsed by Hughes to the Fayette National Bank, and when presented for payment was duly protested. It appears that this check was given to Hughes for the purchase price of a horse. Summers was engaged in the business of breeding saddle horses, and went to Kentucky to purchase a stallion. There he met with John T. Hughes, who lived at Lexington, and told him that he wished the horse for breeding purposes, and wanted a horse that carried a high straight tail, as he wished to breed it for his own use and profit, and that a horse carrying a low crooked tail was not good for breeding purposes, as that quality would be transmitted to its offspring. Hughes showed Summers a horse four years of age, stated that it was a thoroughbred, but had not been registered; that it was sound and carried a high straight tail. Summers drove and rode the horse, and had it ridden and driven for him, examined it carefully, and noticed a small scar under the horse's tail and called Hughes' attention to it. Hughes stated that he had not noticed it before, but that he knew it had not been cut for the purpose of straightening the tail as he had raised the horse.

After bringing the horse home, Summers discovered that in driving him he would carry his tail well and straight for a time, but, upon becoming fatigued, he would hold it to one side. There was no other fault found with the horse than the one mentioned

Having discovered this defect, Summers determined not to pay the check, and instructed the bank to protest it when presented for payment, and then wrote Hughes that the horse had been misrepresented to him, that he did not carry a high straight tail, and that he did not want it as it was valueless to him for breeding purposes. Having notified Hughes that the horse did not suit him, and that he would not pay the check, he turned it out in the pasture where the horse broke one of its legs and was killed. Upon examination of its tail after death, evidence was found

that an operation had been performed upon its tail, leaving a scar to which Summers had called the attention of Hughes.

On the part of the bank, it was shown that Hughes indorsed the check to the Fayette National Bank, which placed the proceeds to his credit; that upon receiving notice of the protest of the check, the bank, without the knowledge of Hughes, charged the check back to him. As soon as Hughes was made aware of this fact he protested against this being done, and insisted that there was no liability upon him with respect to the check, except as indorser upon it, and that the bank must proceed to make the money out of the drawer of the check. Thereupon the bank did as directed, credited Hughes with the amount of the check, and instituted this suit.

There is no evidence that the bank had any knowledge whatever of any equities or set-offs existing between Hughes and Summers when it in the first instance passed the amount of the check to the credit of Hughes.

Both plaintiff and defendant asked for instructions, all of which were refused by the court, which then proceeded to instruct the jury as follows:

"The court instructs the jury that if they shall believe from the evidence that the plaintiff bank received the check which is the * * * of this suit as a deposit to be treated as cash, and that such was the intention of the parties (Hughes and the bank), at the time the check was received and deposited, then title to said check passed to the bank at that time. But if the jury shall believe from the evidence that the parties intended that the bank should not receive said check as cash, but only as an agent for collection, then title to said check did not vest in the bank at the time of the deposit.

"The court further tells the jury the question as to whether the parties intended the check when deposited to be treated as cash or merely for collection is one of fact for the jury under all the facts and circumstances proven in the case relating thereto and throwing light thereon.

"If the jury shall believe from the evidence that the parties (Hughes and the bank), at the time the check was received and deposited, intended that the same should be treated as cash, then the plaintiff is entitled to recover in this action, unless they further believe from the evidence that, at the time of the deposit, the plaintiff had notice of the matters affecting Hughes' right to recover on said check, if any.

"But if the jury shall believe from the evidence that the check was intended by the parties to be deposited merely for collection, then the plaintiff cannot claim to be a purchaser for value, and without notice of the matters affecting the consideration of the check; but if the jury shall believe that after said check was

protested the bank purchased the check, it is entitled to recover whatever amount of said check, if any, the jury may find due after allowing any offsets, if any they may find due under the evidence, on account of the matters alleged in defendant's special plea."

We are of opinion that these instructions correctly apply the law to the facts of the case.

Checks deposited and credited do not become the property of the bank, even though the depositor has been allowed to check against the deposit before the paper is collected, and the depositor can recover the check or other paper." Morse on Banks, (4th Ed.) § 586.

In National Bank *v.* Miller, 77 Ala. 173, 54 Am. Rep. 50, it is said: "When a check is deposited it is taken generally for collection by the bank as the agent of the depositor, and the bank does not owe the amount until its collection is accomplished. It may be that, if it is passed to the credit of the depositor, and mingled with the general funds of the bank, it is prima facie a payment of deposit; but the bank may permit, as a matter of favor and convenience, checks to be drawn against it before payment, the depositor in the event of nonpayment being responsible for the sums drawn—not by reason of his indorsement, the check not having ceased to be his property, but for money paid."

Conceding that there was a false representation upon which the defendant was entitled to a set-off against the check, it still appears that the horse was of considerable value for other than breeding purposes; in other words, that the damages sustained by reason of the false representation did not go to the full amount of the check, which represented the entire value of the horse. The defendant, Summers, admits that the horse was worth $125, and there was other evidence tending to prove that it was of even greater value. The verdict of the jury, which denied the right of the plaintiff to recover anything, ought to have been set aside by the trial court as contrary to the evidence.

For these reasons, its judgment must be reversed, and a new trial awarded.

Note.

This case involves a question of considerable importance.

The general question of the relation between depositors and banks, as regards their respective rights in and title to negotiable paper deposited by the former with the latter, is much embarrassed by a conflict of authority. But, after all, the conflict is more apparent than real. It will be found that the views expressed by the highest tribunals in this country and England, when carefully examined, differ not so much in the principles announced as in the facts to which these general principles have been, from time to time, applied. In most of the cases in which it has been held that the title to negotiable paper passed to the bank from a depositor, it will be found that such paper was indorsed in blank, or made payable to the bank, as in this case.

And though not unmindful of that sound juridical principle that differing facts may justly lead to differing conclusions of law, in our opinion, the bank in this was, as a matter of law, the owner of this check, because the check was endorsed to the order of the bank and the proceeds credited to the depositor as cash.

In Illinois.—"The general doctrine that a deposit being made by a customer, in a bank, in the ordinary course of business, of money, or of drafts or checks received and credited as money, the title to the money or to the drafts or checks is immediately vested in, and becomes the property of the bank, is not open to question." American Exchange Nat. Bank *v.* Gregg, 37 Ill. App. 425, citing Cragie *v.* Hadley, 99 N. Y. 131.

In this case the court said: "This being the rule of law, it is clear that Kershaw & Co. became entitled, immediately on the credit being given, to draw checks against it on the bank, and that it was the duty of the bank to pay such checks until said credit was exhausted. Kershaw & Co. had no ownership in, or control over, the drafts after they were transferred to the bank, and no liability upon them except as indorsers. Hence the subsequent failure of the bank to realize on the paper is not a circumstance which would excuse it from performing its implied contract to pay out, on checks of its depositor, the money which it placed to the credit of his account, as consideration of the transfer made to it of the drafts and certificate of deposit. Met. National Bank *v.* Lloyd, 90 N. Y. 530; Armengand *v.* Condort, 27 Fed. R. 247."

Maryland.—When a check, draft, or promissory note is indorsed in blank, or to the order of the bank, and the proceeds credited to the depositor as cash, the bank becomes the owner of the paper by virtue of the indorsement, and, in case it is not paid at maturity, it has the ordinary remedies which belong to the indorsee of instruments of this character which have been dishonored. Tyson *v.* Western Nat. Bank, 77 Md. 412, 26 Atl. 520.

Endorsement for Deposit.—Where a check is deposited indorsed "for deposit to the credit of" the depositor, and is so credited to him as cash, and later transferred as cash to a second bank which pays the first bank, the depositor cannot reclaim it or its proceeds on failure of the first bank. The title passed and is in the second bank, and the testimony of the depositor that he regarded all checks deposited by him as deposited for collection, is incompetent. Ditch *v.* Western National Bank, 79 Md. 192 (29 Atl. 72). But in this case strong dissenting opinions were delivered.

In this case the court disapproves Bank *v.* Miller, 77 Ala. 168; Freeman *v.* Bank, 87 Ga. 45; Beal *v.* City of Somerville, 1 C. C. A. 598, 50 Fed. 647. But these cases are reviewed at great length and approved by Judge Fowler in his dissenting opinion.

Minnesota.—Upon a deposit being made by a customer in a bank, in the ordinary course of business, of money, checks, drafts, or other negotiable paper received and credited as money, the title of the money, drafts, or other paper immediately becomes the property of the bank, which becomes debtor to the depositor for the amount, unless a different understanding affirmatively appears. Fletcher *v.* Osbourn (Minn.), 57 N. W. 336; Security Bank of Minnesota *v.* Northwestern Fuel Co., 58 Minn. 141, 59 N. W. 987.

Indorsement for Deposit.—"Where a customer has a deposit account with a bank, on which he is accustomed to deposit checks payable to himself, which are credited to him on his account, and against which he is authorized to draw, an indorsement 'For deposit' is, in the absence of a different understanding, a request and direction to deposit the sum to the credit of the customer, and passes the absolute

title to the check to the bank. Bank *v.* Miller, 77 Ala. 168; Bank *v.* Smith, 132 Mass. 227." Security Bank of Minnesota *v.* Northwestern Fuel Co., 58 Minn. 141, 59 N. W. 987.

In Security Bank of Minnesota *v.* Northwestern Fuel Co., 58 Minn. 141, 59 N. W. 987, the facts were these: "The defendant gave its check for $418.12 on the Bank of Minneapolis, payable to the order of the Mill Wood Company, which was a customer of, and had a deposit account with, the plaintiff, on which it was accustomed to deposit cash and checks, which were credited to its account, and against which it was authorized to draw its checks. On the same day on which the Mill Wood Company received the check it indorsed it, 'For deposit in the Security Bank to the credit of the Mill Wood Company,' and deposited it, with other checks, with the plaintiff, receiving a deposit slip, and being credited with the amount on its deposit account. Immediately preceding this deposit the Mill Wood Company's account was overdrawn, but, after making this deposit, and another, made the same day, there was a balance to its credit of $376.30, including the credit for the check in question. The next morning it drew checks against its account, which were paid, which overdrew its account $363.72, and this overdraft has never been paid. Subsequently, on the same day, the check was duly presented for payment to the Bank of Minneapolis, but was dishonored, for the reason that the defendant had forbidden its payment. Immediately afterwards the Mill Wood Company became, and still remains, insolvent. This is a suit on the check." It was held, that the title to the check had passed to the plaintiff, because the indorsement of the Mill Wood Company was sufficient, and was not restrictive or qualified.

Missouri.—The effect of a bank receiving a check so endorsed by a customer in blank and in giving him credit for the amount thereof on its books as so much money deposited against which plaintiff can immediately draw, is to make defendant a purchaser. The title passes from plaintiff and vests in defendant so that it becomes the absolute owner thereof. The defendant becomes the debtor of the plaintiff for the amount of the check. Ayers *v.* Bank, 79 Mo. 421; Bullene *v.* Coats, 79 Mo. 426; Kavanaugh *v.* Farmers' Bank, 59 Mo. App. 540.

New Jersey.—In Titus *v.* Mechanics' National Bank, 6 Vroom 588, Chancellor Zabriskie said that checks received by a bank and credited as cash were to be treated in the same way as if the credit was of notes of other banks, and that by such credit the bank becomes the owner of the checks as fully as if they were legal tender notes or bank bills deposited. Hoffman *v.* First National Bank, 46 N. J. L. 604.

The holder of a check payable to order, and endorsed in blank by the payee, with a general endorsement, is presumed to be the owner, and such check, like other commercial paper will pass by delivery. Hoffman *v.* First National Bank, 46 N. J. L. 604.

A check deposited by general endorsement of payee, and passed to his credit on the books of a bank, becomes the property of such bank, and may legally be transferred to a bona fide creditor. Hoffman *v.* First National Bank, 46 N. J. L. 604.

In Terhune *v.* Bergen County Bank, 7 Stew. 367, the checks, which were deposited to the account of the depositor by the Bergen County Bank, had been forwarded to the Chatham National Bank of New York for collection, and had been collected and the proceeds credited to the Bergen County Bank before its failure. It was held, that the depositor was not entitled to preference and payment over other depositors, but was only a general creditor of the bank for the proceeds of the collection, and must accept his dividend like other depositors.

But if checks are deposited with a bank and endorsed generally,

if the bank holds the checks until after its insolvency, and does not transfer them to a bona fide holder and they come to the hands of a receiver, a court of equity may compel return to the depositors. Opinion of Nixon, J., in Balbach *v.* Frelinghuysen, 6 N. J. Law Journal, April, 1883.

Pennsylvania.—Drafts or checks held by banks, drawn in their own favor, are prima facie presumed to have been received by them on deposit as cash from their customers, and not to have been deposited for collection merely, unless some evidence be adduced to show that fact. That a check was taken as cash, it may well be impossible for a bank, in the multiplicity of its transactions, to trace and prove. It would be credited in the depositor's account simply as so much money, and no entry necessarily made in any other book to show from whom it was received. Gettysburg National Bank *v.* Kuhns, 62 Pa. St. 88.

A check was drawn by a United States paymaster in favor of the cashier of a bank, was received by the bank and the money collected by him. It was shown that the check was for a soldier's bounty and had been forwarded to a third person. Held, that the bank was not liable merely on these facts. Gettysburg National Bank *v.* Kuhns, 62 Pa. St. 88.

Mr. Daniel's View.—But the position taken by our court, which seems to be the minority rule, is supported by Mr. Daniel, in his work on Negotiable Instruments, in which he says, that "Later cases hold, and correctly, as we conceive, that the checks deposited in bank by its customers do not at once become the property of the bank, but that it continues to be the agent of the customer until actual collection, the check in the meantime remaining the property of the depositor."

And this even though the endorsement was in blank or to the order of the bank; and he cites among other cases Balbach *v.* Frelinghuysen, 15 Fed. 675.

Rule in Federal Courts.—In Balbach *v.* Frelinghuysen, 15 Fed. 675, the court seems to repudiate this doctrine that whenever a banking association gives credit upon its book to a depositor for the amount of a check deposited for collection, the title to the check immediately passes to the bank, and it becomes the holder for value.

It was there said that the practice which has grown up among banks to credit deposits of checks at once to the account of the depositor, and to allow him to draw against them before the collection, is a mere gratuitous privilege, which does not grow into a binding legal usage.

Endorsement for Collection.—The payees should always take the precaution to indorse the words "for collection" on the checks; by endorsing generally, they thereby permit another to appear as owner; and if thereby any person is misled, and a loss incurred, it is proper that they whose carelessness gave opportunity for the other to be deceived should bear the loss. Cecil Bank *v.* Tanners, 22 Md. 148; Hoffman *v.* First Nat. Bank of Jersey City, 17 Vr. 604; Kavanaugh *v.* Farmers' Bank, 59 Mo. App. 540; Tyson *v.* Western Nat. Bank, 77 Md. 412, 26 Atl. 520; Sweeney *v.* Easter, 1 Wall. 166.

The words "for collection" appended to an endorsement limit the effect which the endorsement would have without them, and warn subsequent takers that the purpose of the endorsement, though in blank, is not to transfer the ownership of the paper or its proceeds. Such an endorsement is intended, not to give currency or circulation to the paper, but to have an effect precisely the reverse, i. e., to prevent further circulation, and to limit the authority of the holder to the act of collection, for the benefit of the endorser. Morse on Banking 423; Sweeney *v.* Easter, 1 Wall. 166; Hoffman *v.* First National Bank, 46 N. J. L. 604.